U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue date: 12Sep2001

Case No.: 2001-INA-12

In the Matter of:

KERRY MAHLER,
Employer,

on behalf of

HEDIBERTA NOYOLA,
Alien

Appearances: James L. Rosenberg, Esq.,

Before: Vittone, Burke and Chapman
Administrative Law Judges

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arose from an application for labor certification on behalf of Alien Hediberta Noyola ("Alien") filed by Kerry Mahler ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26.

The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File ("AF") and any written argument of the parties..

STATEMENT OF THE CASE

On June 2, 1995, Employer, Kerry Mahler, filed an application for alien employment certification on behalf of the Alien, Hedilberta Noyola, to fill the position of Domestic Cook. The job to be performed was described as follows:

> The position requires a person to cook, season and prepare meals in a private household. The meals will be prepared in accordance with the employer's instructions or with cook's recipes. The cook will be required to bake breads and pastries, broil, fry and roast meats. The cook will also plan menus, clean kitchen and cooking utensils and order food items and kitchen supplies.

Total hours of employment were listed as 40 hours a week, from 8:00 a.m. to 5:00 p.m., with no overtime required. Minimum requirements for the position were listed as completion of grade school and two years experience in the job offered.

A Notice of Findings (NOF) was issued by the Certifying Officer (CO) on October 28, 1997, citing 20 C.F.R. 656.3 and instructing Employer to provide documentation of its ability to provide permanent, full-time employment to which U.S. workers could be referred. (AF 15-17). A Final Determination denying certification was issued on January 6, 1999, the CO having found Employer's rebuttal evidence insufficient to demonstrate that Employer had regular use for a cook or would be able to fill a full-time schedule. In denying certification, the CO observed that Employer had failed to show sudden or significant change in the family situation, and that Employer had not used a cook to assist, even on a temporary, part-time basis, in the past. (AF 3-4).

Employer appealed, and upon review, the Board of Alien Labor Certification Appeals, (BALCA) issued an Order of Remand on February 23, 2000, remanding the case for review in light of the BALCA's recent holdings in *Daisy Schimoler*, 1997 INA 218 (Mar. 3, 1999)(*en banc)* and *Carlos Uy, III*, 1997 INA 304 (Mar. 3, 1999)(*en banc*).

On remand, the CO issued a NOF proposing to deny labor certification on April 20, 2000, citing Section 656.20(c)(8) and questioning the existence of a bona fide job opportunity open to any U.S. worker. (AF 26-30). The CO noted that under immigration law, the number of immigrant visas available to "unskilled workers" (those occupations requiring less than two years experience) is very limited, whereas there is no current waiting period for most immigrant visas in the "skilled worker" category (at least two years experience). The CO further noted that according to the *Dictionary of Occupational Titles (DOT)*, almost all household positions are classified as unskilled; the occupation of Domestic Cook is an exception. Employer was instructed to explain why the position of Domestic Cook in their household should be considered a bona fide job opportunity rather than a job opportunity that was created solely for the purpose of qualifying the alien as a skilled worker under current immigration law. Rebuttal evidence, at a minimum, was to include responses to five enumerated questions, including documentation where appropriate. (AF 9-12).

In Rebuttal, Employer responded that the household had previously employed several part-time Domestic Cooks, but that because both parents work, and in response to the increased demands of their three children's activities, they felt the need to now employ a Domestic Cook on a full-time basis. Employer stated that they employ no other domestic workers, that all three children attend school full-

time from 8:30 a.m. to 4:00 p.m., with the mother otherwise responsible for childcare, and that the parent and two older children are responsible for general cleaning and maintenance of the home. (AF 4-8).

A Final Determination denying labor certification was issued by the CO on August 16, 2000, based upon a finding that Employer had failed to adequately document that there is a bona fide position for a Domestic Cook in the household. Noting that Employer's rebuttal addressed some of the issues raised but failed to address others, the CO indicated that no tax returns were submitted documenting what proportion of Employer's income was devoted to paying for the petitioned position. Similarly, the CO found Employer's documentation regarding the work hours and the need for a part-time versus full-time cook insufficient. (AF 2-3).

Employer filed a Request for Administrative/Judicial Review on August 31, 2000, and the matter was docketed in this office on December 4, 2000. (AF 1).

DISCUSSION

Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker. This regulation means that the job opportunity must be bona fide, and that the job opening as described on Form ETA 750 actually exists and is open to U.S. workers. The burden of proof for obtaining labor certification is on the Employer who seeks an alien's entry for permanent employment. 20 C.F.R. 656.2(b).

Employer was instructed to submit rebuttal demonstrating why this position should be considered a bona fide job opportunity rather than a job opportunity created solely for the purpose of qualifying the Alien as a skilled worker, which "**at a minimum** must include documentation consisting of data to support each of your assertions," including responses and documentation for the five specifically enumerated issues.

In denying labor certification, the CO concluded that the details provided did not establish that there was a bonafide position for a Domestic Cook. We concur. In *Carlos Uy III*, 1997-INA-304 (BALCA Mar. 3, 1999)(en banc), the Board set forth a "totality of circumstances" test to be used in order to determine the bona fides of a job opportunity in domestic cook applications. As stated by the Board in *Uy*:

> The heart of the totality of the circumstances analysis is whether the factual circumstances establish the credibility of the position. In applying the totality of the circumstances test, the CO's focus should be on such factors as whether the employer has a motive to misdescribe a position; what reasons are present for believing or doubting the employer's veracity for the accuracy of the employer's assertions; and whether the employer's statements are supported by independent verification.

Id.

The burden of proving that the employer is offering a *bona fide* job opportunity is on the employer. *Gerata Systems America, Inc.*, 88-INA-344 (Dec. 16, 1988)(*en banc*); 20 C.F.R. 656.2(b). As was noted by the Board in *Uy*, "[u]nder the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." *Id.* at 8.

The Board in *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*) held that "written assertions which are reasonably specific and indicate their sources or bases shall be considered documentation." The Board went on, however, to state "[t]his is not to say that a CO must accept such assertions as credible or true, but he/she must consider them in making the relevant determination and give them the weight that they rationally deserve." The Board in *Uy* held that "a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof." *Uy* at 9, citing *A.V. Restaurant*, 1988-INA-330 (Nov. 22, 1988); *Our Lady of Guadalupe School*, 1988-INA-313 (June 2, 1989).

In the instant case, the CO found Employer's rebuttal documentation insufficient to establish that there is a bona fide position for a Domestic Cook in Employer's household. Employer's rebuttal evidence consisted of brief responses to the questions presented, with little explanation or documentation in support. As noted by the CO, Employer failed to submit the requested documentation regarding the household's income (tax returns) and the percentage of Employer's income that would go to pay for this position.[1] Employer stated that it had employed part-time cooks in the past, but now had the need for a full-time cook to free up the parents for the many extra curricular activities of the children.[2] Employer, however, failed to adequately explain how the employment of a

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1 In its letter of rebuttal, the Employer, who is a self-employed freelance cook and caterer, stated that, as shown by the enclosed 1999 tax statement, he had the ability to pay for the position. However, no tax statements were provided.

2 The Employer's statements in this regard are conflicting, and thus not credible. Thus, on the one hand, in the original application, the Employer stated that he did not have a California Tax ID as the household did not employ any U.S. workers, and thus could not be considered an employer. The Employer also amended the Form ETA 750, where he indicated that he had employed the alien since September 1993, to reflect that he had "known" the alien since that date, but had not "formally" employed her. (AF 40-41). In his first rebuttal, the Employer stated on the one hand that "The terms and conditions of prior cooks has been to work 40 hours per week preparing and cooking the meals," and on the same page that "a cook is presently being used however the total 40 hour effort is performed piece meal by various persons." (AF 12). In his second rebuttal the Employer stated that the household previously employed several part time domestic cooks (AF 6).

full-time cook, only preparing meals, and working the hours from 8:00 a.m. to 5:00 p.m., would achieve this goal.

Most telling is the schedule submitted by the Employer in response to the CO's request to document how the cook would fill a 40 hour work week. This schedule indicates that the cook would spend one and a half hours to prepare, cook, bake, and serve breakfast. If the cook performed these duties after he/she arrived in the morning at 8:00 a.m., there would be no one there to eat the meal: the mother and three children leave the home at 8:00 a.m., and the father at 9:00. Of course, if some of the preparing, cooking, and baking were done the day before, the cook might have time to serve breakfast to the father. Similarly, an hour and a quarter is allotted for the cook to prepare, cook, and clean up in connection with the lunch meal, but there is no one home to eat the meal, as all five family members take their lunches, which are prepared by the cook, to school or work. The cook would not have time to prepare these lunches in the morning (with the possible exception of the father's lunch, assuming that he is willing to skip breakfast), and thus presumably they would be prepared the previous day, before the cook left at 5:00 p.m. This leaves dinner. There are three hours allotted in the schedule for the cook to prepare, cook, bake, serve, and clean up after dinner. Yet the mother and children do not arrive home until 4:15 p.m., and the father until 6:00 p.m. This schedule would require the cook to prepare the dinner meal ahead of time; the cook would have time to serve the mother and children as soon as they arrived home, assuming that the family eats in shifts, but not the father. The cook would not have time to clean up.

This schedule does not make sense, given the schedules of the family members, and casts substantial doubt on the credibility of the Employer's claims. Certainly, it does not evidence the need for a permanent, full-time position of cook. Nor has the Employer explained or documented how the use of a full-time cook would "free up time" for the parents to participate in the extracurricular activities of the children. The Employer has also given conflicting statements on the past use of a cook, and has failed to document his ability to pay for the position. Given all of these factors, there is ample basis for doubting the Employer's claim that a full-time cook is necessary, and thus that there is a permanent, full-time position available.[3]

The burden of proof for obtaining labor certification lies with the Employer under § 656.2(b). Viewing the evidence as a whole, it is clear that the Employer failed to meet its burden. The CO's reasoning clearly shows that she conducted a totality of the circumstances analysis in reaching her conclusions, and her findings clearly show that she was correct in determining that certification should be denied.

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3 Nor would the Employer's entertainment schedule, which consists of 7-10 luncheons a year, justify the employment of a full-time cook.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED.**

SO ORDERED.

For the panel:

A
LINDA S. CHAPMAN
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.